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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFIKI SMITH,

Defendant and Appellant.

B289463

(Los Angeles County
Super. Ct. No. LA081853)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Idan Ivri and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Rafiki Smith appeals from a judgment entered after a jury convicted him of two counts of first degree burglary and found true the special allegation he committed the offenses for the benefit of a criminal street gang. Prior to trial Smith pleaded guilty to one count of possession of a firearm by a felon. As to the first burglary, the jury found true the special allegation Smith committed the burglary while another person was present inside the residence. Smith contends on appeal there was insufficient evidence a person was present during the commission of the burglary. Smith also asserts the trial court violated his Fifth Amendment right to due process by punishing him for exercising his right to a jury trial when it imposed a sentence greater than what the People had offered prior to trial as part of a negotiated plea.

Smith also contends, the People concede, and we agree remand is necessary to allow the trial court to exercise its discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.), which amended Penal Code sections 667 and 1385,¹ effective January 1, 2019, whether to strike the prior serious felony conviction enhancements the trial court imposed pursuant to section 667, subdivision (a)(1). Smith also asserts, the People concede, and we agree the trial court erred in failing to award him presentence custody credits.

We affirm the convictions and reject Smith's contention he was denied due process. However, we reverse the sentence and remand for the trial court to exercise its discretion whether to impose the sentence enhancements for Smith's prior serious felony convictions, to correct sentencing errors, and to recalculate

¹ All further statutory references are to the Penal Code.

Smith's presentence custody credits. On remand the trial court should also address other sentencing errors we have identified.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Pretrial Proceedings*

1. *The amended information*

The amended information charged Smith with residential burglary (§ 459; counts 1 & 2) and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3). The amended information alleged as to count 1 Smith committed the burglary when another person, other than an accomplice, was present in the residence (§ 667.5, subd. (c)). The amended information further alleged as to counts 1 and 2 Smith committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).)

The amended information alleged as to all counts Smith suffered four prior convictions of a violent or serious felony under the three strikes law (§§ 667, subds. (b)-(j), 1170.12); three prior serious felony convictions within the meaning of section 667, subdivision (a); and three prior felony convictions for which he served separate prison terms within the meaning of section 667.5, subdivision (b).

Smith pleaded not guilty and denied the special allegations.

2. *The People's offer of a negotiated plea and Smith's change of plea on the firearm charge*

On September 26, 2017 the parties appeared in court for Smith to plead no contest to count 3. Prior to the hearing the

prosecutor offered a negotiated plea as to all counts as part of which Smith would be sentenced to 26 years in state prison.² After Smith spoke with his attorney off the record, Smith's attorney informed the trial court, "I just want the record to reflect that I've recommended my client to accept the offer in light of the potential sentence and in light of what I believe to be an assessment of the evidence I just want the record to reflect my assessment having done hundreds of trials that this is not the appropriate case for him to go to trial on, notwithstanding the high offer and the consequences that he's never faced before."

In response, the trial court advised Smith, "So, Mr. Smith, you know what I think of your attorney. I have the utmost respect for him. . . . [He] is someone who goes to trial a lot. He's not afraid to go to trial. He goes to trial more than a lot of attorneys that I know. We don't have this conversation—this is the first time he's ever put this on the record in front of me, that he's telling his client he should take the offer because he wants to make sure when things go down the way I think they may that he's protected" The trial court added, "I'm doing this just because, like I said, it's not going to give me any joy to give you 86 to life. But that's what's going to happen if you're convicted in this case."

Smith confirmed his decision to exercise his right to a jury trial as to counts 1 and 2. However, he pleaded no contest to count 3 for possession of a firearm by a felon (§ 29800, subd. (a)(1)) and admitted the special allegations as to that count that he suffered three prior violent or serious felony convictions under

² The record does not contain any details of the proposed negotiated plea other than the aggregate sentence.

the three strikes law (§§ 667, subds. (b)-(j), 1170.12), which were serious felony convictions under section 667, subdivision (a), and served three prior prison terms within the meaning of section 667.5, subdivision (b).³

Smith waived his right to a jury trial on the prior conviction allegations as to counts 1 and 2.

B. *The Evidence at Trial*

1. *The investigation of knock, knock burglaries*

Los Angeles Police Officer Joseph Hampton was part of a “knock, knock burglary” task force investigating members of the Rollin’ 30’s Crips gang for committing this type of residential burglary. A knock, knock burglary is committed when three to five members of the gang (the “crew”) drive a premium car into an affluent neighborhood and look for houses in which the residents appear not to be home. One crew member then knocks on the front door to verify whether a resident is home, and if there is no answer, one or more crew members enter the residence through the side or rear of the house. Another crew member remains in the car as a lookout and communicates with the other members through a walkie-talkie or cell phone. Sometimes the gang members wear socks on their hands to avoid leaving fingerprints at the scene. The gang members steal jewelry from the residences and sell the jewelry for cash to a jewelry store in South Los Angeles.

³ The record does not reflect the underlying facts supporting Smith’s possession of a firearm, which conviction is not the subject of this appeal.

Los Angeles County Sheriff's Deputy Stephen Medina was assigned to the task force that investigated knock, knock burglaries. As part of the investigation, Deputy Medina obtained Smith's cell phone number from Richard Melendez. Smith had provided his cell phone number to Melendez in August 2015.⁴ Deputy Medina obtained a search warrant to track Smith's phone location in real time using GPS tracking information from the network carrier.

On September 23, 2015 Deputy Medina and other members of the task force tracked Smith's cell phone in real time and conducted surveillance on Smith's movements. Deputy Medina observed Smith sitting in the front passenger seat of a silver Mercedes, and he alerted Tactical Observer Ricardo Curiel of the Los Angeles County Sheriff's Aero Bureau. Curiel was in a helicopter conducting surveillance at an altitude of 5,500 to 7,500 feet. Curiel located the Mercedes and began following it.

2. *The Leibowitz⁵ burglary*

On September 23, 2015 Curiel observed the Mercedes park in front of a house on Wortser Avenue in Van Nuys, where Smith exited from the front passenger seat. Smith walked to the front door of the house, knocked on the door several times, looked around, knocked on the door again, and continued to look around. Smith was holding a cell phone to his ear. After a few minutes,

⁴ Melendez was Smith's parole agent, but that fact was not disclosed to the jury. Smith also admitted to Melendez that he was a member of the Rollin' 30's street gang, and Melendez had observed multiple gang tattoos on Smith.

⁵ The record reflects different spellings for Maydi Leibowitz's last name. We use the spelling Leibowitz provided at trial.

Smith jumped over a fence and went into the backyard of the house. Curiel observed Smith walk through the backyard toward the back of the house, but then lost sight of him. Approximately five minutes later, Curiel saw Smith run from the fence over which he had initially jumped to the Mercedes, then get into the passenger seat. The car quickly drove away.

Maydi Leibowitz lived in the Wortser Avenue house with her husband.⁶ At approximately 1:15 p.m. on September 23 Leibowitz was home alone and was in the bathroom when she heard a “terrible” noise outside followed by “a very, very big bang.” The banging continued “quite a few” more times, and Leibowitz believed a tree had fallen on the roof. Leibowitz stayed in the bathroom and screamed her husband’s name, wondering if he had come home. She called out for him a few times, but there was no response. Leibowitz exited the bathroom and went into the den of her house, where she noticed the French door that led to the backyard was open about seven inches, and there was a hole in the door’s glass. There were “a lot of tiny pieces of glass” on the floor.

Leibowitz “got scared” at the sight of the broken glass and opened the door because she thought someone had entered her house. She looked in other rooms and out the front window, but did not see anyone. As she was getting dressed to leave the house to call the police, Los Angeles Police detectives knocked on

⁶ Leibowitz testified during a conditional examination prior to trial and at trial. Judge Richard G. Kirschner presided over the conditional examination; Judge Michael V. Jesic presided over the trial and sentencing. We include only the facts from Leibowitz’s trial testimony.

her door. She told the detectives what had happened and showed them the French door.

A later forensic examination of Smith's cell phone revealed his phone was within eight meters of Leibowitz's house at 1:01 p.m. on September 23.

3. *The Choe burglary*

Curiel observed the Mercedes leave the house on Wortser Avenue, then stop at a house on Kitteridge Street. Smith exited the vehicle, knocked on the front door, and looked around for approximately two minutes. Smith returned to the Mercedes and re-emerged approximately two minutes later with another male Black suspect. The two men jumped over a gate and forced their way into a pedestrian door leading to the garage. After two minutes, they walked out of the garage and into the backyard toward the back patio. Approximately 25 minutes later, Curiel saw Smith and the other man run out of the front door of the house. Smith was holding a black object as he ran out. The men entered the Mercedes, with Smith in the passenger seat, and the Mercedes drove away.

Later that day Hyun Hee Choe, who lived in the house, received a call from the police informing her of the break-in. Choe returned home to discover "[e]verything was ransacked[,] including the drawers, closets, bathroom, and the kitchen. Everything was inside out." Choe's daughter, who also lived at the house, arrived home to find "everything was flipped over." The garage door and an outdoor gate were broken, and \$100 to \$200 in cash was missing from the daughter's bedroom.

4. *The pursuit and arrest*

Curiel tracked the Mercedes from the air and used a radio to relay the car's location to members of the task force. Los Angeles police officers in two or three marked black-and-white police cars pulled up behind the Mercedes and activated their lights and sirens in an attempt to pull it over, but the car "continually sped away [at a] very high rate of speed" and "[a]lmost hit a couple cars." The Mercedes then crashed into a car, continued driving, then crashed into another car at an intersection, where it stopped. Three Black men, including Smith, exited the car and ran in three different directions. The driver was detained near the scene of the crash, but Smith ran away and climbed over walls until Curiel lost sight of him. A search of the driver revealed a hand held tool designed to break glass.

Shortly after the officers lost sight of Smith, Deputy Medina received a GPS update from Smith's cell phone, which indicated Smith was at a restaurant on Vineland Avenue. Deputy Medina directed Los Angeles Sheriff's Detective Juan Alvarado, who was undercover, to walk inside the restaurant to confirm Smith was inside. Detective Alvarado confirmed Smith was there, and as Smith exited, Detective Alvarado detained him. After Smith's arrest, Detective Alvarado recovered a cell phone and a pair of socks from his search of Smith.

5. *The gang expert testimony*

Los Angeles Police Officers Javier Tafoya and Erin Daugherty testified as gang experts. Officer Tafoya testified the Rollin' 30's Crips gang had over 1,000 members. The primary activities of the Rollin' 30's Crips gang were robbery, burglary,

possession of firearms, sales of narcotics, and felony vandalism. The gang's main source of income was revenue from burglaries, and the gang is known for committing knock, knock burglaries.

Smith admitted to Officer Tafoya that he was a member of the Rollin' 30's Crips gang. In addition, on February 19, 2016 Smith spontaneously told Officer Tafoya, "Fuck you. On Dirt Gang." The Rollin' 30's Crips refer to their gang by this name. Officer Daugherty also opined Smith was a member of the Rollin' 30's Crips gang. Another self-identified member of the Rollin' 30's Crips gang, Daren King, posted a video on YouTube in which he rapped about "floccin," which is the Rollin' 30's Crips gang's term for knock, knock burglaries. The YouTube video was played for the jury.

In response to a hypothetical mirroring the facts of the case, Officer Daugherty testified the burglaries were committed to benefit the Rollin' 30's Crips criminal street gang because they bolster the gang's reputation and provide income for the gang to commit future crimes. The burglaries also promote recruitment because gang members brag about the crimes on social media.

C. *The Verdict and Sentence*

The jury found Smith guilty on counts 1 and 2. The jury found the person present allegation as to count 1 to be true (§ 667.5, subd. (c)(21)). The jury also found the gang allegation as to counts 1 and 2 to be true (§ 186.22, subd. (b)(1)(C)).

In a bifurcated proceeding the court found three of the four strike allegations were true. It found the fourth strike allegation was not true because Smith was 15 years old at the time of the conviction.

In his sentencing memorandum, Smith’s attorney moved to dismiss all but one of Smith’s prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), on the basis the People had previously offered a determinate sentence, which the trial court indicated it would consider; Smith was “young”; Smith did not use a weapon during the crimes; Smith was ineligible for early parole due to the prior strike convictions; Smith would have to serve 85 percent of his sentence;⁷ there was no evidence Smith or an accomplice entered Leibowitz’s house; and the trial court could “still impose a serious and severe determinate prison term without imposing a life sentence.”⁸

At the sentencing hearing, Smith’s attorney urged the trial court to impose a determinate term, pointing to the prior negotiated plea offer and the court’s discussion with Smith prior to trial about the benefits of a negotiated plea. Smith’s attorney acknowledged Smith rejected the offer, but nevertheless argued the trial court should “never, never, never punish[] a person for going to trial.”

⁷ Under section 2933.1, subdivision (c), “A defendant convicted of a violent felony, as defined in section 667.5, may not accrue presentence conduct credits greater than 15 percent of his or [her] actual period of confinement. [Citation.] One such violent felony is first degree burglary ‘wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.’” (*People v. Garcia* (2004) 121 Cal.App.4th 271, 274.)

⁸ Although Smith’s written motion stated he was seeking to dismiss one prior strike conviction, we read his motion to request dismissal of all but one prior strike convictions because he requested the trial court impose a determinate sentence.

The trial court denied the *Romero* motion, stating the court had “given a lot of thought” to the sentence. The trial court reasoned the three strikes law “was designed for people like Mr. Smith who continually commit these crimes.” The court noted Smith committed two first degree residential burglaries in 2014 and a third in 2015. The court added, “And I will never punish someone for going to trial. I try my best to convince them to avail themselves to early admission of guilt. And especially a case like this where I felt the evidence was potentially overwhelming. But you never know in trial how things are going to go. He didn’t . . . want to take advantage of that early admission of guilt. I’ve seen no remorse from Mr. Smith. And a lot of people have been hurt by these residential burglaries.”

The trial court sentenced Smith on count 1 to an indeterminate term of 25 years to life, plus 10 years for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(C), and five years for each of the three prior serious felony convictions pursuant to section 667, subdivision (a), for a total sentence of 50 years to life. The trial court sentenced Smith on count 2 to a consecutive indeterminate term of 25 years to life, plus one year eight months (one third of five years) for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(B). On count 3, the trial court sentenced Smith to eight months (one third the middle term of two years), doubled under the three strikes law to 16 months.⁹ The trial court exercised its discretion

⁹ Although Smith admitted the serious felony allegations as to count 3, the trial court correctly did not impose the enhancements as to that count because section 667, subdivision (a), only applies where the current offense is a serious or violent felony. The trial court also did not impose the serious felony

to strike the three prior prison term allegations (§ 667.5, subd. (b)) as to all counts. The trial court sentenced Smith to an aggregate term of 78 years to life.

The trial court awarded Smith 726 days of actual presentence credit. The court did not award Smith any presentence conduct credits because it believed a life sentence precluded conduct credits.

Smith timely appealed.

DISCUSSION

A. *The Undisputed Evidence Was Legally Sufficient To Support the Enhancement Smith Committed the Leibowitz Burglary While a Person Was Present in the Residence*

1. *Standard of review*

Smith contends there was insufficient evidence to support the jury's true finding on the allegation a person, other than the defendant or accomplice, was present during the commission of the Leibowitz burglary, as charged in count 1.¹⁰ The parties do not dispute the facts: Smith punched a hole in the glass door of the Leibowitz's home, but fled when Leibowitz called out for her

enhancements on count 2. As discussed below, at the time of sentencing the trial court was required to impose the enhancements under section 667, subdivision (a), on both indeterminate terms, but in any event, the court now has the discretion to impose or strike these enhancements.

¹⁰ Although Smith concedes he committed the offense of burglary by breaking the glass in the French door, he argues the allegation a person was present at the time of the burglary was not proven because he never "set foot inside the residence."

husband, and Smith did not step inside the residence. We therefore review Smith’s “challenges to the legal sufficiency of the undisputed evidence supporting the occupied burglary enhancement de novo.” (*People v. Munguia* (2016) 7 Cal.App.5th 103, 109 (*Munguia*); accord, *People v. Harris* (2014) 224 Cal.App.4th 86, 89 [reviewing de novo whether undisputed evidence was sufficient to support jury’s finding defendant committed first degree burglary with a person present].)

2. *Governing law*

“A person who ‘enters any house . . . with intent to commit . . . larceny or any felony is guilty of burglary.’ [Citation.] It has long been settled that the slightest entry by any part of the body or an instrument is sufficient: ‘As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one’s money, are all of them burglarious entries.’” (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 273 (*Magness*); accord *People v. Goode* (2015) 243 Cal.App.4th 484, 489.) “For an entry to occur, a part of the body or an instrument must penetrate the outer boundary of the building.” (*Magness*, at p. 273.)

“Thus, in general, the roof, walls, doors, and windows constitute parts of a building’s outer boundary, the penetration of which is sufficient for entry.” (*Magness, supra*, 54 Cal.4th at p. 274.) “[T]he requirement of entry is not difficult to satisfy; the slightest penetration will suffice.” (*Id.* at pp. 277, 279 [entry of a house even by “a foot, a hand, or a tool” is sufficient for burglary, but finding no entry into residence where defendant stood in

driveway and opened motorized garage door with remote control]; accord, *People v. McEntire* (2016) 247 Cal.App.4th 484, 492 [sufficient entry where defendant's hand penetrated the portal of a sliding screen door and he pulled at the handle of the glass door]; *People v. Calderon* (2007) 158 Cal.App.4th 137, 145 ["kicking in the door of a home is a sufficient entry to constitute burglary"]; *People v. Garcia* (2004) 121 Cal.App.4th 271, 281 [insertion of tool in door jamb of back door constituted entry into residence]; *People v. Osegueda* (1984) 163 Cal.App.3d Supp. 25, 32 [defendant's use of instrument to create a hole in the wall of a store constituted burglary because some portion of the tool had entered the air space of the store].)

First degree burglary is elevated to a violent felony under section 667.5, subdivision (c)(21), when "another person, other than an accomplice, was present in the residence during the commission of the burglary." (See *People v. Singleton* (2007) 155 Cal.App.4th 1332, 1336 (*Singleton*).) As noted, a defendant convicted of a violent felony may earn a maximum of 15 percent in custody credits. (§ 2933.1, subd. (c); *People v. Garcia, supra*, 121 Cal.App.4th at p. 274.) "The plain meaning of 'present in the residence' is that a person, other than the burglar or an accomplice, has crossed the threshold or otherwise passed within the outer walls of the house, apartment, or other dwelling place being burglarized." (*Singleton*, at p. 1337; accord, *People v. Debouver* (2016) 1 Cal.App.5th 972, 981.) Because "burglary is technically complete upon entry," even "[t]he briefest of overlaps between entry and the presence of a nonaccomplice suffices for the enhancement." (*Munguia, supra*, 7 Cal.App.5th at pp. 111-112 [defendant was present during commission of burglary where homeowner not home at time of entry, but returned while

defendant was still in house]; accord, *People v. McEntire*, *supra*, 247 Cal.App.4th at p. 492.) The enhancement applies “even though the defendant had no contact with the occupant and thought no one was present in the home during the burglary.” (*Munguia*, at p. 110.)

3. *The undisputed facts support the jury’s finding a person was present during the burglary*

Smith relies on the holding in *Singleton*, *supra*, 155 Cal.App.4th 1332 to argue a burglary is only a violent felony based on a person being present if the burglar physically enters the four walls of a residence at the time the person is present. Smith’s reliance on *Singleton* is misplaced. There, the court considered whether the victim’s presence in the hallway outside of an apartment unit during a burglary was sufficient to support the enhancement. (*Id.* at p. 1334.) The court concluded there was insufficient evidence to support the enhancement because the victim was outside of the apartment unit at the time of the burglary although he was in the apartment building, explaining the victim is only “present in the residence” if he or she “has crossed the threshold or otherwise passed within the outer walls of the house, apartment, or other dwelling place being burglarized.” (*Id.* at p. 1337.) Because at no point during the burglary was the victim inside the apartment unit, the enhancement did not apply. (*Id.* at pp. 1339-1340.) The court in *Singleton* did not address established law that entry occurs when a burglar’s body or a tool has passed the outer walls of a residence.

By contrast, this case is factually similar to *People v. Garcia*, in which we concluded the evidence was sufficient to

support the trial court's finding the victims were present during the burglary where they were inside the residence while the defendant inserted a tool in the door jamb of the back door, although at some point they ran out of the residence. (*People v. Garcia, supra*, 121 Cal.App.4th at p. 281; see *People v. McEntire, supra*, 247 Cal.App.4th at p. 492 [substantial evidence supported finding a person was present during the burglary where the defendant used his hand to open a sliding glass door, thereby penetrating the space between the screen door and glass door during the "few seconds" the resident was sitting in her living room before she fled].)¹¹

B. *The Trial Court Did Not Punish Smith for Exercising His Right to a Jury Trial*

Smith contends the trial court punished him for exercising his right to a jury trial by sentencing him to a prison term of 78 years rather than a sentence more comparable to the 26 years in prison the prosecutor offered as part of a negotiated plea.¹² This contention lacks merit.

¹¹ Smith also contends the violent felony enhancement should not apply because he "broke off the burglary" when he realized Leibowitz was home, thereby avoiding any confrontation. But as discussed, there is no requirement a burglar have contact with the victim during the burglary for the person present enhancement to apply. (*Munguia, supra*, 7 Cal.App.5th at p. 110.)

¹² The People contend Smith forfeited this argument by failing to object at the time of sentencing. However, Smith's attorney made clear at the sentencing hearing his view the trial court should sentence Smith to a determinate term in light of the prior negotiated plea offer, arguing the court should "never,

“It is well settled that to punish a person for exercising a constitutional right is ‘a due process violation of the most basic sort.’ [Citation.] The constitutional right to trial by jury in criminal prosecutions is fundamental to our system of justice (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; [citation]); thus, we have stated that ‘only the most compelling reasons can justify any interference, however slight, with an accused’s prerogative to *personally* decide whether to stand trial or to waive his rights by pleading guilty.’ [Citation.] ‘A court . . . may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.’” (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279 (*Lewallen*); accord, *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 762 (*Ghebretensae*).)

To show the trial court imposed a harsher sentence on a defendant as punishment for exercising his or her jury trial right, “[t]here must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of that right.” (*Ghebretensae, supra*, 222 Cal.App.4th at p. 762.) “The mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights.” (*Ibid.*)

never, never punish[] a person for going to trial.” Because Smith adequately raised this concern in the trial court, he did not forfeit the argument. (*People v. Clark* (2011) 52 Cal.4th 856, 966 [issue not forfeited where record was clear trial court understood the defendant’s claim]; *People v. Scott* (1978) 21 Cal.3d 284, 290 [“the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented”].)

Further, “a trial court’s discretion in imposing sentence is in no way limited by the terms of any negotiated pleas or sentences offered the defendant by the prosecution.” (*Lewallen, supra*, 23 Cal.3d at p. 281.) “Legitimate facts may come to the court’s attention either through the personal observations of the judge during trial [citation], or through the presentence report by the probation department, to induce the court to impose a sentence in excess of any recommended by the prosecution. [¶] [T]he trial itself may reveal more adverse information about [the defendant] than was previously known.” (*Ibid.*; accord, *Alabama v. Smith* (1989) 490 U.S. 794, 801 [“in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged”]; *Ghebretensae, supra*, 222 Cal.App.4th at p. 763.)

Smith relies on *Lewallen, supra*, 23 Cal.3d at page 280 to support his contention the trial court punished him for his exercise of his right to a jury trial. *Lewallen* is distinguishable. There, after the defendant rejected an offer of a negotiated plea for informal probation, the court sentenced him after trial to formal probation, although the jury acquitted him of multiple firearm offenses. (*Id.* at pp. 276-277.) At sentencing the trial court stated, “[A]s far as I’m concerned, if a defendant wants a jury trial and he’s convicted, he’s not going to be penalized with that, *but* on the other hand he’s not going to have the consideration he would have had if there was a plea.” (*Ibid.*) The Supreme Court concluded the defendant’s due process rights were violated, explaining, “[W]hen the judge’s statements are viewed as a whole, there can be no rational interpretation other than that he was basing petitioner’s sentence at least in part on the fact that he declined the prosecution’s plea bargain and

demanded a trial by jury.” (*Id.* at p. 280.) By contrast, the trial court here stated explicitly, “. . . I will never punish someone for going to trial.” Further, he articulated his reasoning for imposing a harsher sentence, including Smith’s record of multiple recent burglaries, the harm to many people from the burglaries, and Smith’s lack of remorse.

Ghebretensae is directly on point. The defendant there contended the trial court punished him when it imposed a nine-year sentence following trial in contrast to the three-year offer of a negotiated plea. (*Ghebretensae, supra*, 222 Cal.App.4th at p. 761.) At the time of sentencing, the trial court stated it was “not punishing [the defendant] for exercising [his] right to go to trial.” (*Id.* at p. 763.) Instead, the court highlighted the defendant’s recidivist criminal history, including that he had been selling drugs since he was 14 years old and had started selling drugs each time he was released from custody. (*Ibid.*)

In this case, the trial court obtained additional information at trial about Smith’s crimes, his gang affiliation, and his criminal history. Leibowitz described her fear as she heard a “terrible” noise and “a very, very big bang” while she was home alone. She screamed her husband’s name repeatedly. When she found the French doors were open, with shattered glass on the floor, she was scared because she believed an intruder had entered her house. Choe returned home after she was called by the police, and found “[e]verything was ransacked[,] including the drawers, closets, bathroom, and the kitchen.” Choe’s daughter returned to find everything in the house had been “flipped over,” and money was missing from her bedroom. Officer Hampton described knock, knock burglaries as a sophisticated scheme in which a crew, comprised of gang members, drives a premium car

into affluent neighborhoods, locates homes in which the residents appear not to be home, and burglarizes them. As the trial court noted, “a lot of people have been hurt by these residential burglaries.”

The trial court also heard testimony from Officer Tafoya that Smith was a member of the Rollin’ 30’s Crips gang, which was known for committing knock, knock burglaries. A YouTube video was played for the jury in which another Rollin’ 30’s Crips gang member boasted about committing knock, knock burglaries.

The trial court gave “a lot of thought” to Smith’s sentencing, but in denying Smith’s *Romero* motion, the court commented on Smith’s lack of remorse and his recidivist streak for residential burglaries, including convictions of two burglaries in 2014 and one in 2015. The two burglaries in this case were also in 2015. Moreover, once the trial court denied Smith’s *Romero* motion to strike all but one of his prior strike allegations, the trial court had no discretion at the time to impose a sentence for less than 65 years to life.¹³ Under the three strikes law, the trial court was required to impose consecutive sentences of 25 years to life on counts 1 and 2. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512-513 [under the three strikes law, § 667, subd. (c)(6), “clearly provides that consecutive sentencing is mandatory for any current felony convictions ‘not committed on the same occasion, and not arising from the same set of operative facts’”]); accord, *People v. Hojnowski* (2014) 228 Cal.App.4th 794, 800

¹³ Smith does not challenge on appeal the trial court’s denial of his *Romero* motion. Further, as discussed below, the minimum sentence at the time was actually 80 years to life in light of the mandatory sentence enhancements under section 667, subdivision (a)(1), applicable to counts 1 and 2.

[“Section 667, subdivision (c)(6) does not give a trial court the discretion to impose concurrent terms when consecutive sentences would otherwise be mandatory.”].)

In addition, at the time of sentencing, the trial court was required to impose five years for each of the three prior serious felony convictions pursuant to section 667, subdivision (a), which the court imposed on count 1. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272 [“Prior to 2019, trial courts had no authority to strike a serious felony prior that is used to impose a five-year enhancement under section 667, subdivision (a)(1).”]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 [Prior to 2019, trial courts had no discretion to “strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.”].)

Therefore, the only discretion the trial court had was potentially to impose a concurrent term on count 3 for possession of a firearm by a felon (instead of the eight-month consecutive term), strike the gang enhancements, and strike the one-year prison prior enhancements. As to count 3 for possession of a firearm by a felon, there was no evidence Smith was armed with a firearm at the time of the burglaries. Thus, the offenses did not arise from the same set of operative facts. As to the gang enhancements, the court heard testimony at trial about Smith’s membership and allegiance to the Rollin’ 30’s Crips gang, as shown by his gang tattoos, and that the gang was known for committing knock, knock burglaries. The court could have reasonably concluded this was not “an unusual case where the interests of justice would best be served” by striking the gang enhancements. (§ 186.22, subd. (g).) The trial court exercised its discretion to strike the three prior prison term allegations under

section 667.5, subdivision (b), as to all counts. The trial court's imposition of a 78-year sentence under these circumstances did not improperly punish Smith for exercising his right to a jury trial.

C. *The Trial Court Erred in Failing To Award Custody Credits*

Smith contends, the People concede, and we agree the trial court erred when it failed to award Smith presentence conduct credits. The trial court stated Smith was not entitled to presentence custody credits because he was sentenced to an indeterminate term of life imprisonment. However, imposition of an indeterminate sentence does not preclude an award of presentence conduct credit. (*People v. Duff* (2010) 50 Cal.4th 787, 793 [defendant sentenced to an indeterminate sentence not precluded from earning presentence conduct credit]; *People v. Philpot* (2004) 122 Cal.App.4th 893, 908 ["presentence conduct credits are available to a defendant sentenced to an indeterminate life term under the three strikes law"].) On remand the trial court should recalculate Smith's conduct credits, limited to 15 percent of his actual period of confinement resulting from his conviction of the violent felony of first degree burglary with a person present. (§ 2933.1, subd. (c).)

D. *Remand for Resentencing Is Necessary Pursuant to Section 667, Subdivision (a)*

Smith contends, the People concede,¹⁴ and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the prior serious felony conviction enhancements imposed pursuant to section 667, subdivision (a).¹⁵

In 2018 the Governor signed into law Senate Bill No. 1393 (2017-2018 Reg. Sess.), which went into effect on January 1, 2019. Senate Bill No. 1393 amended section 1385 by deleting subdivision (b), which prohibited trial courts from exercising discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667.” (Former § 1385, subd. (b).) Senate Bill No. 1393 applies retroactively to Smith because Smith’s sentence was not final at the time the new law became effective on January 1, 2019. (*People v. Jones, supra*, 32 Cal.App.5th at p. 272 [Sen. Bill No. 1393 applies retroactively]; *People v. Garcia, supra*, 28 Cal.App.5th at p. 973 [same]; see *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [Absent contrary legislative intent, “[i]f

¹⁴ The People conceded remand would be appropriate if Smith’s conviction had not yet become final by Senate Bill No. 1393’s effective date of January 1, 2019.

¹⁵ The trial court should have imposed the enhancements under section 667, subdivision (a), for prior serious felonies to each indeterminate term, instead of only once to the aggregate indeterminate term. (*People v. Williams* (2004) 34 Cal.4th 397, 405 [“[U]nder the Three Strikes law, section 667[, subd.] (a) enhancements are to be applied individually to each count of a third strike sentence.”].) However, under Senate Bill 1393, the trial court on remand has discretion whether to impose the enhancements on one or both counts.

the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.”].)

E. *On Remand the Trial Court Must Address Several Sentencing Errors*¹⁶

The trial court erred in imposing a consecutive term on count 3 of one-third the middle term instead of the full base term because the indeterminate and determinate terms must be calculated separately. (*People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1412; *People v. Neely* (2009) 176 Cal.App.4th 787, 798.) As the court in *Neely* explained, “Once the court determines what sentence is to be imposed for the indeterminate term offenses and the determinate term offenses, it combines the two to reach an aggregate total sentence.” (*Neely*, at p. 798.) The court observed, “Such sentencing has been conceptualized as sentencing in separate boxes. [Citation.] Applying this ‘box’ analogy to the instant case, the indeterminate term crime of first degree murder is placed in one box. . . . [¶] A second box is created to include the three determinate sentence crimes. Applying section 1170.1, the court would select a base term for each of the crimes, set the crime with the greatest base term as the principal term, [and] impose the full base term as the sentence for the principal term crime” (*Id.* at pp. 798-799.) On remand the trial court must impose the full base term on count 3 (after selecting the lower,

¹⁶ Although the parties have not raised these sentencing errors, on remand the trial court must correct an unauthorized sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Wilson* (2013) 219 Cal.App.4th 500, 518.)

middle or upper term), but has the discretion whether to impose the term as a consecutive or concurrent term.

The trial court also erred in imposing a 10-year enhancement on count 1 for the gang allegation pursuant to section 186.22, subdivision (b)(1)(C), applicable to violent felonies, and an enhancement of one-year eight months (one third of five years) on count 2 for the gang allegation pursuant to section 186.22, subdivision (b)(1)(B), applicable to serious felonies. The trial court should have instead imposed on each count a 15-year minimum parole eligibility term applicable to offenses for which a defendant is sentenced to a life term. (§ 186.22, subd. (b)(5).)

Section 186.22, subdivision (b)(5), provides in pertinent part, “[A]ny person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.” Because the trial court imposed a life sentence on counts 1 and 2, under section 186.22, subdivision (b)(5), imposition of a 15-year minimum eligibility term was mandatory upon the jury finding the offense was committed to benefit a criminal street gang. The 15-year minimum eligibility term applies instead of the five- and 10-year enhancements otherwise applicable to serious and violent felonies under section 186.22, subdivision (b)(1)(B) and (C), respectively. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007 [the Legislature “intended to exempt [crimes with life terms] from the 10-year enhancement in subdivision (b)(1)(C)”]; *People v. Williams* (2014) 227 Cal.App.4th 733, 744-745 [10-year enhancement under § 186.22, subd. (b)(1)(C), did not apply to felony for which defendant was sentenced to life term under three strikes law]; see *People v. Francis* (2017) 16 Cal.App.5th 876, 883

[[Section 186.22,] [s]ubdivision (b)(1) applies to every gang crime except those designated in subdivision (b)(4) and subdivision (b)(5).”].)

DISPOSITION

The convictions are affirmed. We reverse the sentence and remand with directions for the trial court (1) to exercise its discretion whether to impose the sentence enhancements for Smith’s prior serious felony convictions pursuant to section 667, subdivision (a); (2) to correct an unauthorized base term on count 3 for a felon in possession of a firearm; (3) to impose a 15-year minimum parole eligibility term on counts 1 and 2 pursuant to section 186.22, subdivision (b)(5); and (4) to recalculate Smith’s presentence custody credits.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.